NO. 86-1536

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

WADE POWELL and FREDA POWELL, his wife, and ERWIN WHITE and SUSAN WHITE, his wife,

Petitioners,

versus

STATE OF FLORIDA, MUNROE REGIONAL MEDICAL CENTER, WILLIAM H. SHUTZE, M.D., KEITH GAUGER, THOMAS M. TECHMAN, NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., METROPOLITAN DADE COUNTY AND THE FLORIDA MEDICAL ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, RABBINICAL ASSOCIATION OF GREATER MIAMI, TEMPLE BETH OR, AND RABBI RAMI SHAPIRO, Ph.D., IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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24pp

QUESTION PRESENTED FOR REVIEW

DOES A STATE'S REMOVAL OF THE CORNEAS OF A DECEDENT WITHOUT THE CONSENT OF THE NEXT OF KIN VIOLATE THE FAMILY'S FUNDAMENTAL RIGHTS OF PRIVACY OR PERSONAL LIBERTY PROTECTED BY THE DUE PROCESS CLAUSE?

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INTEREST OF AMICUS[1]/

The Rabbinical Association of Greater Miami is an organized confedera-

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1/ Letters consenting to the filing of this brief are being forwarded to the Clerk of Court.

tion of more than 100 rabbis throughout South Florida representing Orthodox, Conservative, Reform, and Reconstructionist congregations. Virtually every Jewish congregation and synagogue within the South Florida geographic area is represented within the Association, which in turn is representative of the considerable Jewish population throughout the United States. As a leadership group for the Jewish people, the Association takes stands on specific Jewish issues. Through its membership, the Association provides spiritual and temporal guidance for the rabbis in the South Florida area and to the approximately 400,000 members of the Jewish population.

Temple Beth Or is a Reconstructionist synagogue in South Florida, founded in April 1983. Its membership includes more than 100 Jewish families. At the

heart of the Reconstructionist philosophy of Temple Beth Or is the conviction that Judaism represents the accumulated wisdom of the Jewish people and is renewed through each successive generation. Temple Beth Or, through its members, expresses and encourages involvement with the difficult Jewish issues of today in an effort to promote the integration of Jewishness into the lives of Jews. Its members recognize the need for observance of Judaic law.

Rabbi Rami Shapiro, Ph.D., is the rabbi at Temple Beth Or. As a religious leader, he speaks out on issues concerning the survival of the Jewish people and its culture. He has a strong interest in Jewish religious law, customs, and traditions involving matters of life and death. He is a frequent lecturer and author on Jewish religious and cultural issues.

These Amici strongly maintain that questions concerning removal of organs from a decedent must be examined in light of Jewish law as well as by taking into consideration modern societal principles. It is their view that any law which permits the taking of organs must respect existing religious principles. It is their intention to advise this court of Jewish law concerning the matters raised in this case. Amici have a direct interest in the resolution of this question since the ability of the Jewish people to practice their religion will be jeopardized by the decision of the Supreme Court of Florida.

Amicus Curiae were represented in proceedings before the Florida Supreme Court, having filed an amicus brief in that tribunal, and seek to assist this court in resolving this very important case.

SUMMARY OF THE ARGUMENT

The donation of body parts for the advancement of medical science or the preservation of human life is a matter which must be committed to the personal decision of the individual or the family. When tissue and organ donation is placed in the context of Jewish life, it also becomes a matter of religious law. Although it remains a personal matter, the decision to donate body parts is affected by the Jewish belief that both the body and the soul are sacred because both are the handiwork of God and are entitled to reverence. Kohn v. United States, 591 F.2d 568, 572-573 (E.D.N.Y. 1984), aff'd, 760 F.2d 253 (2d Cir. 1985).

The Florida Cornea Removal Statute has as its purpose the commendable objective of providing quality cornea tissue to people in need. The statute

promotes the restoration of sight to countless people, thus improving the quality of life for those individuals and, by extension, for all society. Notwithstanding this laudatory purpose, the statute permits medical examiners to remove cornea tissue without first obtaining permission from the person, while living, or from the decedent's next of kin. To the extent that the statute authorizes the taking without reasonable notice and an opportunity for consent, the statute conflicts with fundamental constitutional freedoms. Since the statute on its face permits the taking of cornea tissue from the body of an observant, but now deceased, Jew absent individual or familial consent, the Cornea Removal Statute infringes upon the free exercise of religion and effectively promotes interests which are inimical to those of

Judaism, without any countervailing government need. The statute has the inevitable effect of making second class citizens of Jews and members of all other religions which disfavor anatomical donation without consent.

The statute further elevates the needs of authorized eye banks above the interests of the individual and the family, which unconstitutionally infringes on the right of the family to direct disposition of the remains of its members. Absent a compelling state interest and given the availability of less intrusive alternatives, the taking of corneas without personal or family consent cannot be condoned. To the extent that the statute permits this illegitimate conduct, it must be ruled unconstitutional.

REASONS FOR GRANTING THE WRIT

THE FLORIDA CORNEA REMOVAL STATUTE UNCONSTITUTIONALLY INFRINGES ON FUNDAMENTAL PERSONAL AND RELIGIOUS FREEDOMS BY PERMITTING THE REMOVAL OF BODY PARTS WITHOUT CONSIDERATION OF INDIVIDUAL OR FAMILY CONSENT.

The Cornea Removal Statute,[2/] a

[2/] The Cornea Removal Statute, §732.9185, Fla.Stat. (1983), provides:

> (1) In any case in which a patient is in need of corneal tissue for a transplant, a district medical examiner or an appropriately qualified designee with training in ophthalmologic techniques may, upon request of any eye bank authorized under §732.918, provide the cornea of a decedent whenever all of the following conditions are met:
>
> (a) A decedent who may provide a suitable cornea for the transplant is under the jurisdiction of the medical examiner and an autopsy is required in accordance with §406.11.
>
> (b) No objection by the next of kin of the decedent is known by the medical examiner.
>
> (c) The removal of the cornea will not interfere with the subsequent course of an investiga-

(fn.Cont.)

portion of the Florida Anatomical Gift Act,[3] permits the medical examiner to provide a cornea upon request of an authorized eye bank whenever the decedent is under the jurisdiction of the medical examiner, there is no objection by the next of kin known by the

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tion or autopsy.

(2) Neither the district medical examiner nor his appropriately qualified designee nor any eye bank authorized under §732.918 may be held liable in any civil or criminal action for failure to obtain consent of the next of kin.

[3] The Florida Anatomical Gift Act, §§732.910-732.921, Fla. Stat. (Supp. 1984), is an adaptation of the Uniform Anatomical Gift Act. The purpose of the Act, as found within the legislative declaration, is to encourage the pre- and post-mortem **donation** of tissue and organs as gifts for medicine and research. §732.910, Fla.Stat. (Supp. 1984). Florida law defines a gift as the voluntary transfer of property by one to another without any consideration or compensation. 28 Fla.Jur.2d Gifts §1. The taking of bodily tissue or organs by means other than the voluntary act of the person or the decedent's family cannot be considered a gift.

medical examiner, and the removal of the cornea will not interfere with the subsequent course of an investigation or autopsy. 1977 Op. Att'y Gen. Fla. 077-14 (Nov. 2, 1977). The inclusion of a "no known objection" standard as a basis for permitting the removal of a cornea is singularly unique to the Cornea Removal Statute and is not found within any other part of the Anatomical Gift Act. Compare §732.912, Fla.Stat. (Supp. 1984)(provides for the **donation** of body parts for purposes consistent with the legislative intent to benefit medical science or human life).

The Cornea Removal Statute impermissibly conflicts with valid constitutional interests by permitting the removal of corneas without obtaining the inter vivos consent of the person whose cornea will be removed or the consent of the family of a deceased person whose

cornea will be taken. The statute disregards any valid religious and family concerns with the sanctity of the human body and the reverence due the body at the time of death. The statute conflicts with the guarantees of the First and Fourteenth Amendments to the United States Constitution. Because the statute permits and authorizes state action which violates individual religious interests and inhibits the free exercise of religion, this Court must grant certiorari review in order to assess the constitutionality of this law, which is not unique to Florida but encompassed within the laws of at least eleven states.

To Jews, the subject of the dead and their treatment is one of historical importance and concern.[4/] A central

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4/ See I. Jakobovits, Jewish Medical Ethics Ch. 12 (1959) (hereinafter (fn.Cont.)

component of Jewish law is that an aura of reverence for both the body and its spiritual counterpart must exist in both life and death.5/ The same reverence for life is equally a part of matters involving the dead.6/

Jewish law rigorously upholds the inviolability of the human body in death as well as life.7/ This includes a general disfavor of anatomical dissec-

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Jakobovits).

5/ Judaism believes in the principle that body and soul are sacred because both are the handiwork of God and are entitled to reverence. I. Klein, A Guide to Jewish Religious Practice 270 (1979).

6/ S. Krauss, 2 Talmudische Archaeologie 55 and 473 n. 411 (Leipzig 1910-1912).

7/ Jakobovits at 135. This accounts for the Jewish opposition to cremation. I. M. Rabinowitch, Post-Mortem Examinations and the Jewish Law 19 (Montreal 1945). Jewish law proscribes autopsies except in cases of need, when the autopsy must be conducted with a sense of reverence for the body and is limited to those portions of the body needed for examination. Jakobovits at 278-283.

tion and a complementary teaching that the whole body must be buried upon death. If body parts have been removed, they must be returned and buried with the rest of the body.[8] Under Jewish law, man does not control the rights to the body,[9] for human life and its bodily vessel are "the possession of the Holy One...."[10]

The use of corneal grafts to restore sight to the blind can be considered a life-saving act, if prior consent of the donor or the family has been obtained.[11] This narrow exception to the rigidly defined Judaic law that the entire body must be buried is in

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8/ Rosner, Autopsy in Jewish Law and the Israeli Autopsy Controversy, Jewish Bioethics 331, 332 (1979).

9/ Jakobovits at 98.

10/ S. J. Lewin, Le'or Hahalakhah 188 (1946).

11/ Jakobovits at 286 n.126.

keeping with a central component of Jewish thought: life itself is sacred and Jews should assist in the saving of lives. Even when permission is granted for a cornea transplant for the purpose of restoring sight to a blind person, Jewish law requires that the disused portion of the eye after the cornea has been removed cannot be disposed of except by burial.12/ Absent these considerations, there can be no compliance with the Judaic mandate that the body be treated with reverence.

Thus, for the Jew observant of orthodox thought and religious tenets, matters involving anatomical separation call into question serious religious principles. In light of these strong religious concerns, it is not surprising that Jewish law mandates that the

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12/ Id.

separation of tissue and organs from the body occur only in cases of medical need with the person's free will and consent in writing.[13] A decision to take organs or tissue without individual permission shows a demonstrated lack of reverence for the body. It violates, moreover, the religious beliefs of a considerable segment of the population.

Considerations of expediency must not be permitted to overshadow religious interests. Unfortunately, the decision of the Florida Supreme Court elevated private interests, as bootstrapped by governmental concerns, above those of the individual without any finding of need, particularly where an affirmative answer to the consent question was readily available. State v. Powell, 497 So.2d 1188 (Fla. 1986).

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[13] Jakobovits at 150. See also H. Adler, Anglo-Jewish Memories 137 (1909).

A serious danger to religious freedom exists in any situation where the state, by action of its positive law, can separate the body from its tissues and organs without consent, as this statute permits, and absent any requirement to attempt to obtain consent. Even at the point of death, a human body does not belong to the state, but is a responsibility of the next of kin.14/ This was the holding of Kohn v. United States, 591 F.Supp. at 573: "The law in the United States appears to be established that the next of kin have the right to possession of the dead body and that they may have damages for the injury to their feelings from any wrongful handling of the corpse." Even where

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14/ The language of the Anatomical Gift Act supports this position by recognizing the family interest in the decedent's body and encouraging familial support of tissue and organ donations.

the family yields permission to others to deal with the body, the law must impose on the state the obligation to treat the corpse with respect. This obligation, evolving out of religious concern for the body, protects the vital interests guaranteed by the First Amendment. Kohn v. United States, 591 F.Supp. at 573.

The Cornea Removal Statute conflicts with the teachings of Judaism, and other religions. The statute disregards the religious beliefs discussed above, and can hinder observers from practicing their faith. Manifestly, unlike any other portion of the Anatomical Gift Act, the statute promotes the studied ignorance by the medical examiner in matters involving family approval for the taking of corneas. This is a particularly sinister government attitude, especially when it

involves dealings with known Jewish cadavers. Recognizing the orthodox Jewish position that the entire body should be buried, would a medical examiner have any reason to seek family permission for the "donation" of a cornea in the case of a Jewish body? A negative answer from the family would deprive the medical examiner of the needed cornea, while the absence of any inquiry gives the medical examiner immunity for defiling the body in violation of religious tenets.

Organized Judaism is neither unconcerned with nor insensitive to the needs of the living and society for transplant tissue and organs, body parts which further medical research and ultimately advance life. Indeed, Jewish history reflects examples of individuals who have donated their own bodies for the advancement of human life or medical

science.[15] The unselfish act of giving of one's self to help others is worthy of praise. The crucial factor, from a Jewish law perspective, is that the person -- individually or through the family -- must make the intensely personal decision for anatomical dissection and donation. The statute as it exists does not accommodate this religious requirement, and instead permits forced "donation" without consideration of religious scruples. This conflict between government interests and individual rights is the type of controversy which must be resolved by this Court.

There can be little if any valid reason for the state to act in a manner which prevents a person's proper burial and eternal rest for the soul according

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[15] See Jakobovits at 147.

to that person's religious tenets. There is even less reason for the state to deprive the individual of the right to direct compliance with religious law. Organized Judaism recognizes the right of the state to perform autopsies under the limited circumstances directed by §406.11, Florida Statutes, even though the autopsy may conflict with religious preferences. But there is no right for the state to take apart one's body, remove tissue for purposes not associated with that body, and deny an opportunity for the person or the family to object on religious grounds. The statute under consideration is far too broad in promoting the desired ends. The conflict between the need for quality cornea tissue and religious beliefs must be resolved on the side of religious and individual freedom. Until the statute incorporates that right, it cannot be constitutionally validated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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